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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN error,
v.
FRED NICE.
No. ——.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the District of South Dakota, taken under the criminal appeals act of March 2, 1907 (34 Stat. 1246), to review a judgment sustaining a demurrer to the indictment. The indictment is based upon the act of January 30, 1897 (29 Stat. 506), prohibiting the sale of intoxicating liquor to Indians, and alleges (Rec. p. 4) that Fred Nice (the defendant in error) on August 9, 1915, at the town of Carter, in the county of Tripp, South Dakota,

sold certain liquors "to one George Cortier, an Indian of the Sioux Tribe of Indians, which said Indian was then and there under the charge of Charles L. Davis, a duly appointed Indian agent of the United States, and an Indian of the Sioux Tribe of Indians, over which said Indian the Government of the United States then and there, through its departments, exercised guardianship, and an Indian to whom, on the 29th day of April, 1902, an allotment of land was made by the United States, and the title to which land the Government of the United States then and there held in trust for said Indian, contrary to the form," etc.

The case involves a construction of the act of January 30, 1897, cited above, and section 6 of the act of February 8, 1887 (24 Stat. 388), relating to Indian allotments, as amended by the act of May 8, 1906 (34 Stat. 182), commonly known and hereafter referred to as the Burke Act.

THE STATUTES.

The pertinent portions of these statutes are as follows: Act of January 30, 1897 (29 Stat. 506):

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom

> allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, * * * shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid * * *.

Section 6 of the act of February 8, 1887 (24 Stat. 388), provided:

> That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart

> from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The act of May 8, 1906 (the Burke Act), amends section 6 of the act of February 8, 1887, above quoted, to read as follows:

> That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted

the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory.

SPECIFICATION OF ERRORS.

I.

That the District Court of the United States in and for the District of South Dakota, Western Division, erred in sustaining the demurrer interposed by the defendant, Fred Nice, to the indictment in said

cause, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

II.

That the said District Court erred in ordering said indictment dismissed, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

III.

That the said District Court erred in holding, deciding, and adjudging that said indictment did not state a public offense against the laws of the United States, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

IV.

That the said District Court erred in holding, deciding, and adjudging that the said District Court did not have jurisdiction of the offense charged in said indictment, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

V.

That the said District Court erred in holding, deciding, and adjudging that the said District Court did not have jurisdiction of the person of the defendant named in said indictment, to which decision and judgment the plaintiff duly excepted and its exception was allowed.

VI.

That the said District Court erred in holding, deciding, and adjudging that the said indictment did not state facts sufficient to charge the defendant with the commission of any offense under the provisions of section 2139, Revised Statutes of the United States, as amended by the acts of Congress of February 27, 1877, July 23, 1892, and January 30, 1897 (29 Stat. 506), to which decision and judgment the plaintiff duly excepted and its exception was allowed.

VII.

That the said District Court erred in its construction of the act of Congress of January 30, 1897 (29 Stat. 506), wherein and whereby it held and decided that by reason of the decision of the Supreme Court of the United States in the case of *In re Heff* (197 U. S. 488) the said act of Congress did not give the said District Court jurisdiction of the offense charged in said indictment or of the defendant named therein, and that said indictment did not state facts sufficient to charge the defendant with the commission of any offense against the laws of the United States, to which ruling the plaintiff duly excepted and its exception was allowed.

VIII.

That said district court erred in refusing to overrule said demurrer of the said defendant and in refusing to compel said defendant to plead to the indictment.

THE QUESTION INVOLVED.

Under the Act of 1887, as construed by this Court in *Matter of Heff* (1905), 197 U. S. 488, as soon as an Indian received an allotment he became a citizen of the United States, and also became subject to all the civil and criminal laws of the State or Territory in which he resided, notwithstanding the allotment was to be held in trust by the United States for such Indian for a period of 25 years, and the Indian could not receive a patent in fee free from the trust until the expiration of said period, and notwithstanding that the Indian remained also in charge of his Indian agent or superintendent; and this Court held that by the Act of 1887 Congress had irrevocably surrendered its power to legislate as to sale of liquor to such Indians, and that the State had gained the exclusive right so to legislate.

The Burke Act of 1906 amended the Act of 1887 by providing that an allotted Indian does not become a citizen of the United States or subject to State laws upon receiving his allotment, but that such change in status shall not take place until he has received his patent in fee.

The indictment in the case at bar differs in no essential particular from that in the *Heff case*, and the facts are the same, except that in the case at bar the Indian to whom the liquor was sold was a member of the Sioux tribe of Indians while in the *Heff case* the Indian was of the Kickapoo tribe; and in the case at bar, the sale of liquor was made *after* the passage of the Burke Act of 1906, but to an Indian who had re-

ceived his allotment *prior* to the passage of that act, while in the *Heff case* the allotment and the sale were both made prior to the Burke Act.

The court below and the defendant in his brief rely on the Heff case as decisive. The Government contends that the Heff case should not control—first, because, since the passage of the Burke Act of 1906, it has been substantially overruled by this Court in United States v. Pelican; second, because if not so overruled, it should be now reconsidered and overruled by this Court for the reason that insufficient consideration was given by this Court in the Heff case to the fact that Revised Statutes, section 2139, and the Act of 1897 were not mere exercises of the Federal police power, but were regulations of commerce with the Indian tribes, control of which Congress did not and could not, by the Allotment Act of 1887, irrevocably relinquish as to Indian allottees while they still remained members of Indian tribes.

ARGUMENT.

GENERAL CONSIDERATION OF THE POWER OF CONGRESS OVER THE INDIAN TRIBES AND OVER MEMBERS OF THE TRIBES.

The power of Congress over the Indian is threefold. First, it springs from that clause of the Constitution giving to Congress the right to make all needful rules and regulations respecting the Territory or other property belonging to the United States. It is not here involved, because the indictment at bar does not allege the sale as committed on the property of the United States.

The second source of power is the Commerce Clause. Section 2139 of the Revised Statutes, prohibiting sales of liquor to Indians, of which the Act of January 30, 1897, is an amendment, was taken from the general act of 1834, as amended, which was entitled, "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers," and was thus clearly referable to the commerce clause. (*United States* v. *Holliday*, 3 Wall. 407.)

The third form of Congressional power over the Indian is of an anomalous character and has arisen out of the necessities of the situation rather than from any express constitutional sanction. It involves the conception of the Indians as dependent peoples in a state of pupilage under the guardianship of the Federal Government. When the Indians are spoken of as "wards of the Government," it is with this peculiar conception in view. It was first clearly recognized by this Court in *United States* v. *Kagama* (1886), 118 U. S. 375, where the power of the Federal Government to punish murder and other crimes (Act of Mar. 3, 1885; 23 Stat. 385) not referable to the powers of Congress under the Commerce Clause, was upheld upon this theory.

THE HEFF CASE.

The facts were that Heff sold liquor to one Butler, a member of the Kickapoo Indian Tribe, who had received an allotment under the Act of 1887, but who was still under charge of an Indian superintendent. The Act of 1897 forbade such sale to an

allotted Indian. Heff claimed that the Act of 1897 was beyond the power of Congress to enact, inasmuch as Butler had, by the Act of 1887, been made a citizen of the United States and had by the express provision of the Act been made subject to the State laws.

This Court sustained the contention and held the Act of 1897 was beyond the power of Congress, on the ground that it was an attempt to exercise police power regulation over an Indian whom Congress had expressly placed "beyond the reach of police regulations."

> (p. 509) We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created can not be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

The Government respectfully submits further that the Court in the *Heff case* failed to recognize sufficiently that while Congress, by the Act of 1887,

subjected allottee Indians to State laws, it subjected them only to such State laws as were applicable—i. e., only to such State laws as were within the plane of State legislation. The phrase, "subject to the laws, civil and criminal, of the State," did not subject the allottee Indian to *all* State laws, for it was well established that State laws relating to taxation of his property did not apply. Therefore, the real question before this Court was: to what State laws did Congress intend to subject the Indian allottees? Exercise by Congress of its constitutional powers over the Indians was entirely compatible with subjection of Indians to those State laws which were strictly within the domain of State legislation.

The Government claims that, Congress, by the Act of 1887, did not intend State laws to apply which were incompatible with the constitutional power of Congress to protect those allottee Indians who still remained *in fact* Government wards (in so far as they were under charge of an Indian agent) and who still remained *in fact* members of the Indian tribes and therefore subject to the exclusive power of Congress to regulate commerce with the Indian tribes.

As an illustration, these allottee Indians and their children were still under Government wardship to the extent that the Government provided and still provides schools for their children. This, of course, it had no power to do unless it retained Federal control of the allottees as wards under the Constitution. Having provided schools, it clearly had the power to require the allottee's children to attend

the schools and to impose penalties on allottee parents for not sending their children. Is it possible that the allottees were also to be subject to State laws compelling school attendance?

As another illustration, it is alleged and conceded in the *Heff case* and in the indictment in the case at bar that the Indian was still under charge of an Indian superintendent or agent. He was not removed from such charge by any provision of the Allotment Act of 1887; for not even the controverted phrase, "subject to the laws, civil and criminal, of the State," worked any change in his status so far as concerned the control which the Government retained over him through its Indian agents.

Since there was on the Federal statute books in 1887 the law which forbade sale of liquor to Indians under charge of an Indian superintendent or agent (Rev. Stat. sec. 2139), how can it be said that Congress intended by the Act of 1887 to subject these allottees to any State laws relative to sale of liquor to these very Indians of whom the Federal Indian agent and superintendent still had charge? Was it not the logical conclusion that sale of liquor to such Indians was a subject over which the Government still retained its constitutional legislative power and with which State legislative power was not compatible?

In other words, as long as these allottee Indians remained tribal Indians and in charge of a Federal Indian agent, so long there was a constitutional duty on the Government to protect them (*United*

States v. *Kagama*, *supra*); and Congress had not only no intention but no power to subject these allottee Indians in such condition to State laws which should interfere with this exclusive constitutional power of protection and of regulation of commerce with the Indian tribes.

THE STATUS OF ALLOTTED INDIANS IN GENERAL AS MEMBERS OF INDIAN TRIBES.

The Government submits that in deciding in the *Heff case* that Congress intended by the use of the phrase, "subject to the laws both civil and criminal of the State," in the Act of 1887, to terminate the allottee Indians' status as wards of the Government and as members of the Indian tribes, this Court failed to give due weight to the actual situation of the allotted Indians.

In the first place, it is to be noted that such Indians, after 1887, and in 1904 (when the sale was made to the Indian in the *Heff case*), still remained under the charge of the Indian agents and superintendents. This was true as to the particular Indian in the *Heff case*, and also to the Indian in the case at bar, and is so alleged in the respective indictments.

Among the powers of Indian agents with respect to allotted Indians under their supervision are the following:

To protect allotted Indians desiring to adopt habits of civilized life in the quiet enjoyment of the lands allotted to them. (R. S. 2119.)

To sell stock belonging to Indians for their benefit. (R. S. 2127.)

To manage and superintend intercourse with the Indians, and execute regulations and duties prescribed by the President, Secretary of the Interior, or Commissioner of Indian Affairs. (R. S. 2058.)

Among the regulations promulgated by the Commissioner of Indian Affairs was the following (Mar. 1, 1904):

> 107. Where Indians who have been allotted lands continue to live within the boundaries of an Indian reservation, over which the United States has control as over Indian country, such Indians must be held to be under control of the agent in charge and subject to the rules and regulations prescribed for the Government of Indians upon a reservation. The circular letter of January 10, 1901, will control in such cases. (Circ. I. O., July 23, 1901.)

Furthermore, allotted Indians remain wards and tribal Indians to such an extent that the Secretary of the Interior may by regulation decide who may be regarded as members of the tribe. "A regulation obviously made for the welfare of the rather helpless people concerned. The Indians have been treated as wards of the Nation. Some such supervision was necessary and has been exercised." (*West* v. *Hitchcock* (1907), 205 U. S. 80, 85. See also *Sizemore* v. *Brady* (1914), 235 U. S. 441, 450.)

Furthermore, the Government retained control over allotted Indians to the extent of providing schools for them. Thus, on the six Sioux reserva-

tions[1] set apart by the Act of March 2, 1889 (25 Stat. 888), the Government maintains seven boarding schools with a total average daily attendance of 875.7 pupils, and 57 day schools with a total average attendance of 924.8 pupils, and all of these instrumentalities for civilization are maintained by the United States in the discharge of its duties toward its Indian wards.[2] (Report, Commissioner of Indian Affairs for year ending June 30, 1915, pp. 160, 162, 163.)

The report of the Commissioner of Indian Affairs for the fiscal year ending June 30, 1915 (Table 3, p. 74 et seq.), shows the following pertinent facts: Excluding the Five Civilized Tribes, the Osages, and the Sacs and Foxes in what was formerly the Indian Territory (to whom the act of 1887 is not applicable), and Indians in Alaska, the number of Indians in the United States who are under the supervision and guardianship of the Government is 205,508.[3] Of this total under Federal supervision, 78,581 are allotted Indians. In round numbers, 65,000 Indian allottees

[1] These six reservations are the Rosebud, Pine Ridge, Cheyenne River, Lower Brule, Crow Creek, and Standing Rock.

[2] By art. 7 of the treaty of April 29, 1868 (15 Stat. 635), with the Siouxs, the United States bound itself to educate their children and to provide schoolhouses and teachers. By the act of Mar. 2, 1889 (25 Stat. 888, sec. 17), article 7 of the treaty of 1868 was continued in force for 20 years; and by section 20 of the same act it was provided that the Secretary of the Interior should cause to be erected "not less than 30 schoolhouses, and more, if found necessary, on the different reservations, at such points as he shall think for the best interest of the Indians." Since 1909, when the 20-year extension of art. 7 of the treaty of 1868 expired, it has been extended for a year at a time by each annual appropriation act.

[3] The territory occupied by the Miamis and Peorias in the Indian Territory was also excluded from the operation of the act of 1887. (See Sec. 8 of said act.) These Indians have not been deducted from the total given, since their population is inconsiderable and is not separately listed in the table from which these figures have been obtained.

became citizens under the Act of 1887 before its amendment by the Burke Act of May 8, 1906 (Report of Commissioner of Indian Affairs, 1911, p. 23). Of 21,082 Sioux Indians under Federal supervision in South Dakota, 17,839 are allotted. Of the latter number, 16,230 hold trust or restricted fee patents. These Indians are living with their tribes within the various reservations and are just as much members of their tribes in fact as they were before they received allotments.

STATUTORY DUTY OF UNITED STATES ATTORNEYS RELATIVE TO ALLOTTEE INDIANS.

Within six years after the Allotment Act of 1887 Congress showed that it considered allottee Indians to be still wards of the Nation, both as to person and property; for by the Indian Appropriation Act of March 3, 1893 (27 Stat. 612, 631), it was provided that "in all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity."

This statute is still in force. It constitutes a clear declaration by Congress that allotted Indians were not yet thought capable of managing their own personal affairs, and that they were still personal wards of the Government, notwithstanding the grant of citizenship made by the allotment act of 1887.

Assistant Attorney General Van Devanter (now Mr. Justice Van Devanter of this Court), in an opinion, rendered November 23, 1897, construing this

provision (25 Land Dec. 426), held that it was not confined to suits arising under laws relating to the public lands, but that the language is "broad and comprehensive enough to include *all actions* to which an Indian coming within its terms is a party."

> To bring him (i. e., an allotted Indian) within the purview of the law in question it must, however, appear either that the United States still retains and exercises control over said land, or that the individual still maintains his tribal relations, and therefore remains under the care and protection of the United States.

This opinion has been followed by the Department of Justice to the present day, and United States attorneys are instructed to represent allotted Indians in suits affecting all their rights.

The Indian (Cortier) in the case at bar, being "an allotted Indian," within the meaning of the statutes, as construed above, possesses the right to be represented by the United States district attorney in all suits at law and in equity.

STATUS OF THE ALLOTTED INDIAN IN THE CASE AT BAR AS A MEMBER OF THE SIOUX INDIAN TRIBE.

The indictment alleges that George Cortier, to whom the liquor was sold, was "an Indian of the Sioux tribe of Indians." This is a sufficient allegation of his membership in the tribe. It further alleges that he is "under the charge of Charles L. Davis, a duly appointed Indian agent of the United States." Both these allegations were admitted by the demurrer,

and show clearly that the Act of January 30, 1897, is constitutionally applicable to this Indian.

It is open to this Court to take judicial notice of the fact that Charles L. Davis (mentioned in the indictment) is the officer in charge of the Rosebud Sioux Reservation in South Dakota. Moreover, the records of the Indian Office show that the Indian Cortier has been carried for a number of years upon the rolls as a member of the Sioux tribe located on the Rosebud Reservation; that as such he has received his share of the annuities resulting from the sale of tribal property under sec. 12 of the Act of March 2, 1889, 25 Stat. 888, which, like the general allotment act of 1887, provides for the sale of surplus tribal lands with the consent of the tribe upon such terms as shall be considered just "between the United States and *said tribe of Indians,*" after lands have been allotted to all the members of the tribe. The funds arising from such sale are to be held in the Treasury "for the sole use of the *tribe.*"

This is a clear recognition by Congress of the existence of the Sioux Indians *as a tribe.*[1] Cortier's name appears on the most recent annuity roll for this tribe, made up in April–June, 1915. Such annuities are held by the Government to his credit, and he can not

[1] Allotments on the Rosebud Reservation have been made under this act of Mar. 2, 1899. But sec. 11 of said act provides that allottees thereunder "shall be entitled to all the rights and privileges and be subject to all the provisions of sec. 6 of the general allotment act of 1887." Therefore the question of the right to sell liquor to an allottee under this act of 1889 is the same as with respect to an allottee under the general act of 1887, considered in the *Heff case.*

spend any part of such moneys without application to and consent of the Indian Office. Annuities have also been paid to him, as to other Indians on the Rosebud Reservation entitled to the same, under the act of March 2, 1907, 34 Stat. 1230. That act made provision for the sale of the unallotted portion of the Rosebud Reservation. Section 5 provided for the deposit of the proceeds in the United States Treasury "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation, * * * the interest to be paid to the Indians per capita in cash annually."

The Rosebud Sioux Indians (to which the Indian Cortier in the case at bar belonged) possessed property on June 30, 1915, valued at $20,403,157, of which $16,870,234 was classed by the Indian Office as individual property and $3,532,932 as tribal property, and of the latter sum $2,998,423 consisted of tribal funds held for the tribe in the Treasury of the United States. (Report of the Commissioner of Indian Affairs for the year ending June 30, 1915, p. 205.)

It is clear, therefore, that the Rosebud Sioux Indians are still recognized by the executive departments of the Government in a tribal capacity.

The Act of March 2, 1889, c. 405 (25 Stat. 888), and the Act of March 3, 1899, c. 1150 (30 Stat. 1362); and the Act of March 2, 1907, c. 2536 (34 Stat. 1230), are clear recognitions by Congress of the tribal existence of the Rosebud Sioux Indians.

EFFECT UPON THE INDIANS OF THE HEFF DECISION.

It was the decision that Congress could not regain control of the Indian that was the serious portion of the *Heff* opinion. For if this were true, if the step taken by Congress in 1887 were irrevocable as to all Indians who had received allotments prior to the Burke Act of 1906, then no matter how disastrous such freedom from Federal control should prove to the Indian himself, the United States Government would be powerless to prevent or remedy the disaster.

No sooner was the *Heff* decision made in 1905 than its injurious effects were at once shown.

The State, having no power to tax these Indian allotments, had no particular interest in the Indian's welfare; the State, county, and municipal authorities were somewhat apathetic; they were loath to give the Indian the benefit of their schools and other public institutions or to incur the expense of prosecuting offenses in his behalf. This apathy on the part of the local authorities toward Indians has been a subject of frequent comment by Indian superintendents and Commissioners of Indian Affairs.[1]

> Again, it is useless to look to the authorities of the vicinage to do anything with an Indian allottee, or for him, in the way of discipline, if, though a landowner, he is not a taxpayer

[1] See, for example, Report of Commissioner of Indian Affairs, 1906, p. 39: "The superintendent in charge of the Yakima Reservation reported on July 21, 1906, that the prosecuting attorney of the county informed him that as the Indians do not pay taxes he does not propose to put the county to any expense in prosecuting them or in giving them protection, especially when crimes are committed on the reservation; this policy, he says, is in accordance with the instructions of the county commissioners."

> and thus a sharer of the community's burdens. (*The Indian and His Problem* (1910), p. 236, by Francis E. Leupp, Commissioner of Indian Affairs, 1904–1909).

There has followed the usual cycle of dissipation, drunkenness, disease, disaster, and death. Striking testimony to this effect also will be seen in the official reports of the Superintendent of Indian Reservations, contained in the reports of the Commissioner of Indian Affairs (see extracts in Appendix A of this brief):

> The other result was the exposure of the Indian to easy debauchment by the dramseller. For nearly 18 years after the passage of the Dawes Act, persons indicted for selling intoxicants to allottees and running the gauntlet of the local courts in the frontier country invariably pleaded that there was no constitutional limitation on the right of any citizen to buy, or of any licensed dealer to sell him, as much liquor as he wished. The decisions were almost as varied as the complaints. (*The Indian and His Problem* (1910), p. 36, by Francis E. Leupp.)

The immediate result of the *Heff case*, in Congress, was the passage of the Burke Act in 1906, by which the subjection of the Indian allottees to State laws was, as phrased in *United States* v. *Pelican* (1914), 232 U. S. 442, "postponed" to the expiration of the 25-year trust period and the issue of the patent.

For, as this Court said in *United States* v. *Celestine* (1909), 215 U. S. 278, 291:

> The act of May 8, 1906, c. 2348, 34 Stat. 182, extending to the expiration of the trust period

> the time when the allottees of the act of 1887 shall be subject to State laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty.

It is clear that a reversal of the *Heff case* was, to use the language of this Court in another connection in *Dick* v. *United States* (1908), 208 U. S. 340, 355, "demanded by the highest considerations of public policy, whether we look to the proper government of the Indian tribes by the United States or to the safety and happiness of the Indians themselves."

This Court, as soon as the *Heff* decision was made, proceeded to restrict and differentiate it in the subsequent cases. A distinction was made between the Indian allottee in the *Heff case*, who by the general statute was not only made a United States citizen but also expressly subject to State laws, and the Indian in the *Celestine case, supra*, who by a special statute was made a United States citizen, but without being subjected to State law in express terms. This distinction, it is submitted, was without logical basis. This Court has since frequently held that United States citizenship of an Indian was entirely consistent with tribal existence, Indian character, and continued personal wardship. Now, to make an Indian a citizen of the United States necessarily makes him a citizen of the State in which he resides, and therefore necessarily makes him subject to the laws of that State. It is difficult to see how an express provision in the statute that he shall be subject to the laws of the State

makes him any more subject thereto than he would otherwise be by mere implication from the fact of becoming a citizen of the State.

In either event, he only becomes subject to such laws of the State as are within the plane of State jurisdiction, i. e., to such laws as deal with subjects over which the State, and not the United States, has control.

The most incongruous situation has been brought about by these decisions, as follows:

If Heff sold liquor to two Indians living on adjoining lots—to A, who received his allotment prior to the Burke Act in 1906, and to B, who received his allotment after 1906—then the State officers would prosecute in the first case and the United States in the second. (*In re Heff, supra.*)

If Heff sold liquor to C, who received an allotment under a statute granting C citizenship, but without specifically providing subjection to State laws, then the United States officers could prosecute. (*Semble, United States* v. *Celestine* (1909), 215 U. S. 278.)

If Heff introduced liquor into A's, B's, or C's individual allotment, the United States officers could prosecute, whether the allotment was made before or after the Burke Act. (*Hallowell* v. *United States* (1911), 221 U. S. 317.)

If Heff murdered A, an allotted Indian, on the reservation in which the allotment was made, the Federal law applied. (*United States* v. *Pelican* (1914), 232 U. S. 442.)

If Heff murdered A, an allotted Indian, off the reservation, the Federal law did not apply and the State

law did (*In re Heff*; and also for the reason that no Federal statute has been enacted covering the case).

The result of the decisions is practically the establishment of a "government in spots," under which the respective Federal and State officers must go armed with the latest revised maps and plats from the Interior Department in order to know where and when they can exercise authority in bringing offenders against the law to justice.

Such being the unsatisfactory condition of the law as to Indians in 1914, the Government contends that the decision of this Court in that year in *United States* v. *Pelican*, 232 U. S. 442, was clearly inconsistent with the *Heff case* and must be deemed to overrule it.

I.

The Government contends that the Pelican case decided in 1914, is inconsistent with the Heff case, and must be deemed to overrule it. In the Pelican case it was alleged that murder of an Indian had been committed by a white man in Indian country. Unless the crime took place in Indian country, it was not punishable by Federal law, since Congress, though having the power to punish murder of an Indian ward in any locality, had only partially exercised its power and had confined its legislation to murder in the Indian country. Unless the murder was of an Indian ward of the Government, the crime was not punishable by Federal law, since the State laws extended to crimes committed even in Indian country by a white man (or non-Indian) against another white man (or non-Indian) and Congress had no power to punish such crimes. The murdered Indian was an allottee having the same status as the Indian in the Heff case and in the case at bar. This

Court held (1) that the allotted land where the murder was committed was Indian country; (2) that the murdered man was an Indian ward under protection of the Government, and that the Federal law and not the State law as to murder applied to him.

The Government now contends that if an allottee Indian is still capable of protection by Federal law against murder, as a ward, he is capable of protection, as a ward, by Federal law against sale of liquor.

THE PELICAN CASE.

It must be borne in mind that the crux of the *Heff case* was: Did Congress by specifically declaring in the act of 1887 that allottee Indians should be subject to State laws evince its intention thereby to relinquish all control over their personal status as Indians; in other words, to abolish the relation of wardship as to their person? It was admitted that Congress by this very act of 1887 expressly retained control over the allottee Indian's land by restrictions of alienation and trusteeship. *It was clearly the intent of the framers of this legislation, by this provision, not simply to protect the Indian's property, but more particularly to protect the Indian himself by protecting his property.* The intent actually was to subject the Indians only to such State laws as were not incompatible with the continued protection of the Indian's person by Federal legislation or with the continued regulation by Congress of commerce with the Indian tribes and their members.

> I do not see on what logical ground we can retain on the statute-book the existing prohibition of the liquor traffic among the Indians,

> and the requirement that for a certain period these people shall continue subject to the Government's guardianship, without making the two provisions cooperative, and giving the Government at least this measure of control over the conduct of an Indian for the period that it remains for him in any sense. That is what we do in the case of trusteeships other than governmental, and we do it quite as much for the moral welfare of the incompetent as for the protection of the competent party in interest. (*The Indian and His Problem* (1910), p. 66, by Francis E. Leupp, Commissioner of Indian Affairs, 1904–1909.)

The *Pelican case* came up on demurrer to an indictment brought under Revised Statutes, section 2145, and Penal Code, section 273, for murder of one Louie, "a full-blood Indian and member of the Colville tribe" (just as in the case at bar, Cortier is "an Indian of the Sioux Tribe of Indians"), committed in the Indian country. It was assumed that the defendant was not an Indian. Congress, while having the power to protect its Indian wards by punishing their murder anywhere, had only legislated so as to punish their murder in Indian country (Rev. Stat., sec. 2145).

In order to sustain the jurisdiction of the Federal court, therefore, it was necessary to prove—first, that the crime had been committed within the Indian country, since otherwise there was no Federal statute applicable; second, that the deceased was an Indian ward, since otherwise Congress had no power to punish murder committed in a State, whether in Indian country or not.

Revised Statutes, section 2145, does not make any distinction in express terms between crimes committed by or against Indians and crimes committed by one white man against another; yet, it has been held by this Court, and is now well-settled law, that when a Territory is admitted to the Union as a State upon an equal footing with the other States, in the absence of an express retention of jurisdiction by the United States, the State has jurisdiction of crimes committed upon a reservation by white men against white men, i. e., by non-Indians against non-Indians. (*United States* v. *McBratney* (1885), 104 U. S. 621; *Draper* v. *United States* (1896), 164 U. S. 240). When the Territory becomes a State, the United States no longer has sole and exclusive jurisdiction within the Indian country or reservation. Its general power to punish crimes upon an Indian reservation within a State is limited to crimes *by* Indian wards (*United States* v. *Kagama* (1896), 118 U. S. 375; act of Mar. 3, 1885, 23 Stat. 385, now sec. 328 of the Penal Code), and to crimes *against* Indian wards (*Donnelly* v. *United States*, 228 U. S. 243, 271–272; *United States* v. *Pelican*, at p. 445); and can be sustained only upon the theory that such Indian is a ward of the Government and hence, from his peculiar personal relation to it, entitled to its protection.

It follows that in the *Pelican case* (assuming, as this Court assumed, that the defendant was a white man, and the crime being murder committed within a State), it was essential for the Government to prove that the deceased was as to his person a ward of the

Government. The interest of the United States as trustee in lands of allotted Indians is purely proprietary (*McKay* v. *Kalyton*. (1907), 204 U. S. 458; *Hallowell* v. *United States* (1911), 221 U. S. 317); Hence, it was not sufficient to prove that the Government had jurisdiction over the allottee's property, for that in itself would not give the Federal court any jurisdiction over the crime of murder (as stated, *supra*). In addition, it must be shown that the murdered man had not the status of a white man—i. e., that the Government still had guardianship of the Indian's person.

If, therefore, the *Heff case* was correct in holding that an allotted Indian is a citizen of the United States, and of the State wherein he resides and as to his personal status is completely emancipated from Federal guardianship and control, and hence that the Government has no longer power to protect his person, it follows that he is obviously upon the same plane as a white citizen of the State, and that if he is murdered the State alone can punish his murderer.

Upon the first point, this Court said (p. 450):

> It is true that by section 6 of the act of 1887, 24 Stat. p. 390, it was provided that upon the completion of the allotments and the patenting of the lands to the allottees under that act every allottee should "have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory" in which he resided. See *Matter of Heff*, 197 U. S. 488. *But, by the act of May 8,*

1906, c. 2348, 34 Stat. 182, Congress amended this section so as distinctly to postpone to the expiration of the trust period the subjection of allottees under that act to State laws. [Here the court quoted the provisions of the Burke Act.] *We deem it to be clear that Congress had the power thus to continue the guardianship of the Government.* * * * And these provisions leave no room for doubt as to the intent of Congress with respect to the maintenance of the Federal jurisdiction over the allotted lands described in the indictment.

And upon the second point (p. 451):

A cognate question is presented as to the status of the person with whose murder the defendants are charged. It is not alleged in the indictment that the defendants were Indians and we assume that they were not. *But the court below had jurisdiction if the deceased was an Indian ward. Donnelly* v. *United States, supra,* pp. 269–272. It is alleged, as already stated, that the deceased was "a full-blood Indian, a member of the Colville Tribe," and, further, that he had received an allotment of land under the act of 1887, as amended in 1891, and under the act of July 1, 1892, the land being held in trust by the United States for 25 years from the date of the patent, July 31, 1900. *Upon this statement, the deceased must be regarded as one who was still under the Government's care. Congress had not terminated that relation, and the commission of a crime against his person upon Indian lands, such as we have*

found the allotted lands in question to be, was punishable under the laws of the United States.

This Court held squarely (1) that the crime was committed in Indian country and (2) *that the deceased was under the care of the Government.* Yet, the deceased was an Indian, who received an allotment "under the provisions of the act of Congress approved February 8, 1891, and under the act of July 1, 1892," receiving his trust patent on July 31, 1900 (*United States* v. *Pelican*, Rec., p. 2) [1]— i. e., prior to the Burke Act. In other words, the deceased was an Indian in precisely the same condition and status as the Indian in the case at bar.

The Government contends that if the person of the Indian still continued under its care (even after he received his allotment in trust) to such an extent as to entitle him to protection and to punishment of anyone violating his person, then clearly the Government could also protect his personal status to the extent of punishing sale of liquor to him. If the murder law of the State could not reach the assailant of the Indian, how could the State liquor law control sales of liquor to a similar Indian?

[1] The amendment of 1891, 26 Stat. 794, does not affect the question of citizenship and subjection to State laws. The act of July 1, 1892, 27 Stat., 62, provided for the restoration of a portion of the Colville Reservation to the public domain and for allotments which were to be made as provided in the general allotment act of 1887. Obviously, therefore, the allottee in the *Pelican case* was to be treated as if he had received his allotment under the provisions of the act of 1887 alone, with respect to acquisition of citizenship and subjection to State laws, and the court so regarded him.

There are some indications in the *Pelican Case* that its decision was put upon the ground that the Burke Act of 1906 was retroactive in its effect and that it removed from subjection to the State laws Indians who had received allotments prior to 1906. Thus this Court states that the purpose of the Burke Act was "to postpone to the expiration of the trust period the subjection of allottees under that act to State laws," and "to continue the guardianship of the Government." Similar expressions as to the Burke Act were previously used by this Court in *United States* v. *Celestine* (1909), 215 U. S. 278, 291, and in *Perrin* v. *United States* (1914), 232 U. S. 478, 487.

By these expressions, this Court, of course, clearly did not intend to hold that the Burke Act deprived any Indian of citizenship—i. e., of the rights of suffrage or other constitutional rights of citizens—for this Congress could not do. This Court did, however, apparently hold that the Burke Act reestablished the Government guardianship; in other words, the protection of the person theretofore given by the Government to its Indian wards, and supposed (until the *Heff* decision) to be still in force. Such protection this Court has in many instances held to be entirely compatible with the United States citizenship of the Indian.

If the expressions used by this Court are thus to be taken to mean that the Burke Act continued the guardianship over the personal status of Indians who had received allotments prior to that act, then this Court thereby clearly overruled that portion of the

Heff case which distinctly held that Congress had no power to resume control over the personal status.

The Government, in candor, however, calls attention to the fact that the report of the committee of the House of Representatives (House Report No. 1558, 59th Cong., 1st sess., Feb. 21, 1906), accompanying H. R. 11946 (afterwards the Burke Act), would seem to indicate that the intention was that the provisions of that act should not be retroactive.

Yet, even if the Burke Act was not retroactive, the Government submits as argued, *supra*, that this Court in the *Pelican case* overruled the other branch of the *Heff case* which decided that the person of an allottee Indian was in fact no longer under Government guardianship.

The case of *State* v. *Lott* (1912), 21 Idaho, 646, holding that the State courts had jurisdiction over larceny from an allotted Indian committed on his allotment, is clearly overruled by the later decision in the *Pelican case*.

REGULATION OF COMMERCE WITH THE INDIAN TRIBES.

II.

If this Court shall hold that the Pelican case can be reconciled with the Heff case, then the Government submits that this Court should reconsider and overrule the Heff case.

It is the contention of the Government in this case that allottee Indians, even after the Allotment Act of 1887, still remained members of Indian tribes; that the Indian Liquor Act of January 30, 1897, was a valid exercise of the power of Congress under the Commerce Clause, and not an exercise of police power;

and that Congress, by the Act of 1887, did not in fact relinquish, and had no power, in law, to relinquish, to the States its exclusive constitutional regulation of commerce with the Indian tribes and their members.

1. *The power of Congress to regulate commerce with the Indian tribes is exclusive.*

The power of Congress to regulate commerce with the Indian tribes is as exclusive as the power to regulate commerce with foreign nations granted in the same clause of the Constitution and in the same terms.

> *Worcester* v. *Georgia* (1832), 6 Pet. 515, 560.
>
> *Howard* v. *Ingersoll* (1851), 13 How. 380, 409.
>
> *United States* v. *Forty-three Gallons of Whiskey* (1876), 93 U. S. 188, 194.
>
> * * * Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes, a power as broad and as free from restrictions as that to regulate commerce with foreign nations.
>
> *Dick* v. *United States* (1908), 208 U. S. 340, 353.
>
> Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. * * * The authority of the State can not be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.

Joplin Mercantile Co. v. *United States* (1915), 236 U. S. 531, 545:

> The authority of Congress to preserve in force existing laws or enact new ones after statehood with reference to traffic or intercourse with the Indians, including the liquor traffic, was well established; *the power of Congress over such commerce being plenary, and independent of State boundaries.*

(2) *Commerce "with the Indian tribes" includes commerce with the individual members of a tribe.*

This proposition is clearly established by *United States* v. *Holliday* (1868), 3 Wall. 407. The defendant there was indicted under the Act of February 13, 1862, 12 Stat. 339 (which became R. S. sec. 2139), for selling liquor outside a reservation to an Indian under the charge of an Indian agent. The Indian, as the record showed, still retained tribal relations. The Court held that it was within the constitutional power of Congress to prohibit sales of liquor to individual members of a tribe, EITHER ON OR OFF a reservation, and sustained the validity of the act under the Commerce Clause of the Constitution. The Act was attacked upon the ground that it was an exercise of police power and hence came within the exclusive domain of State legislation. This view was clearly and forcibly rejected by the Court (pp. 416, 417).

> The act in question, although it may partake of some of the qualities of those acts passed by State legislatures, which have been referred to the police powers of the States, is, we think, still more clearly entitled to be

> called a regulation of commerce. "Commerce," says Chief Justice Marshall, in the opinion in *Gibbons* v. *Ogden*, to which we so often turn with profit when this clause of the Constitution is under consideration, "commerce undoubtedly is traffic, but it is something more—it is intercourse." The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

As to the power to regulate commerce with individual members of tribes, the court continued:

> If the act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign Governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and, therefore, comes within the terms of the constitutional provision.

The further point was raised in the *Holliday case* as to whether the Indian to whom the liquor was sold was a citizen of the State of Michigan. But this Court dismissed this question summarily, saying (p. 420), that the views advanced rendered this proposition "immaterial to the decision of the case." Yet if he was a citizen of the State, he was necessarily subject to the laws of the State—at least to such laws as the State had a right to pass. In other words, he was as much subject to the laws of the State as was the Indian in the *Heff case*. And yet the Court in the *Holliday case* held the Federal law as to sale of liquor to Indians to be applicable. The Government contends that the two cases are irreconcilable.

(3) *The Act of January 30, 1897, is a regulation of commerce with the Indian tribes.*

It being held in the *Holliday case* that the Act of February 13, 1862, which became, without material change, section 2139 of the Revised Statutes, was a regulation of commerce with the Indian tribes, it is clear that the provision as amended by the Act of January 30, 1897, did not cease to be a regulation of commerce with the Indian tribes.

HISTORY OF FEDERAL LEGISLATION PROHIBITING SALE OF LIQUOR TO INDIANS.

The United States took its first permanent step in general legislation about the Indians in the Act of March 30, 1802, 2 Stat. 139, "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." Its provisions are

largely continued in all later laws. In this act is the first legislative reference to sales of liquor to Indians as distinguished from introduction of liquor into the Indian country. Section 21 authorized the President "to take such measures, from time to time, as to him may appear expedient to prevent or restrain the *vending or distributing* of spirituous liquors among all or any of the said Indian tribes * * *."

The sale of liquor to Indians was first made a penal offense by the Act of June 30, 1834 (4 Stat. 729), which bears the same title as the Act of 1802, and was a general revision of the laws relating to trade and intercourse with the Indians. Such sale has remained an offense ever since. Section 20 of this act provided "that if any person shall sell, exchange, or give, barter, or dispose of any spirituous liquor or wine to an Indian (in the Indian country), such person shall forfeit and pay the sum of five hundred dollars." It is noteworthy that the sale of liquor here prohibited is a sale made *in the Indian country*.

This limitation was removed by an amendment, February 13, 1862 (12 Stat. 338, ch. 24), which provided, "that if any person shall sell, exchange, give, barter, or dispose of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, * * * such person on conviction thereof, before the proper district court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars." It was held in *United*

States v. *Holliday* (1865), 3 Wall. 407, that this covered sales *anywhere in the United States.* The scope of the section was thus materially broadened, and at the same time the punishment was increased.

The offense, as defined by the amendment of 1862, was incorporated in section 2139 of the Revised Statutes in 1874.[1]

> SEC. 2139. No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person, [*except an Indian, in the Indian country,*] who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department.

Revised Statutes, section 2139, was in terms limited to sale, etc., of "spirituous liquors or wine." In 1892 the prohibition was amended so as to apply to "any ardent spirits, ale, beer, wine, or intoxicating

[1] Sales, etc., by Indians in the Indian country were inadvertently excepted in the Revised Statutes. This exception was stricken out by act of Feb. 27, 1877, 19 Stat. 244.

liquors of any kind." Act of July 23, 1892, 27 Stat. 260.

The Act of January 30, 1897 (29 Stat. 507), amended the provision to its present form and repealed the Act of 1892. It materially broadened the scope of the section as to the articles prohibited, and specifically forbade sales, etc., (*a*) to an allotted Indian while title to the allotment should be held in trust by the Government; (*b*) to an Indian ward under charge of any Indian superintendent or agent; (*c*) to any Indian, includiug mixed bloods over whom the Government through its departments exercises guardianship.

The circumstances which gave rise to the Act of January 30, 1897, may be very briefly stated. Section 2139 as it appears in the Revised Statutes, and as amended by the Act of 1892, applied to sales of liquors to any Indian under the charge of any Indian superintendent or agent. After the passage of the general allotment act of 1887, it was held by the Indian Office that Revised Statutes, 2139, would apply to allotted Indians because such Indians continued under the charge of the Indian officers of the Government and continued as members of their respective tribes living on the various reservations. See letter of Indian Commissioner to Congress, June 16, 1895 (Cong. Rec., 54th Cong., 2d sess., vol. 29, p. 896):

> It has been held by this office that Indians to whom allotments have been made, where the allotments are held in trust by the United

States, and the Congress and this department have found it necessary to maintain an agency over them for any purpose whatever, would be under the charge of the United States Indian agent within the meaning of section 2139 of the Revised Statutes as amended by the act of July 23, 1892 (27 Stat. L. 260), and that anyone selling or otherwise furnishing them with intoxicating liquors would be liable to punishment in like manner as they would be if the Indians had not been given their allotments.

This opinion was based on the decision of the Supreme Court in *United States* v. *Holliday* (3 Wall. 407), wherein it was held that the question whether "any particular class of Indians are still to be regarded as a tribe or have ceased to hold tribal relations is primarily a question for the political departments of the Government, and if they have decided it this court will follow their lead."

The reservations were not abolished by the making of allotments. (*Eells* v. *Ross* (C. C. A., 9th Cir.), 64 Fed. 417; *United States* v. *Celestine* (1909), 215 U. S. 278, 286–287.) Decisions, however, were rendered in the lower Federal courts in Oregon and Washington to the effect that because of the provisions of section 6 of the general allotment act of 1887 it was no longer a crime to sell liquor to an allotted Indian. These decisions are unreported, but are referred to in the reports of the Commissioner of Indian Affairs for 1894 (at p. 60 et seq.) and 1895, and in the House and Senate reports upon the act of

1897 (54th Cong., 1st sess., House Report No. 1209; 54th Cong., 2d sess., Senate Report No. 1294), and in the correspondence set forth and made a part of said reports. It was not possible for the Government to appeal these cases, there being then no criminal appeals act. The only resort was to Congress. As a result, the Act of January 30, 1897, was passed amending Revised Statutes, section 2139, so as to make the intent of Congress as to allotted Indians entirely specific.

4. *The Heff case was wrong in treating the Act of 1897 merely as an exercise of the police power. It was enacted under the Commerce Clause of the Constitution; and the power to regulate trade with the Indian tribes belongs exclusively to Congress as long as any Indian tribal status exists. The Heff case is inconsistent with United States* v. *Holliday.*

This Court, throughout its opinion in the *Heff case*, spoke of the Act of January 30, 1897, as an exercise of police power (197 U. S. 488, at p. 505 et seq.). It started out with the premise that the exercise of the police power by Congress in Indian affairs was only justified with respect to Indians who were wards of the Government. It concerned itself solely with this well-established but extra-constitutional status of the Indians as "wards of the Government." Reasoning from the premise stated, this Court concluded that allottees under the Act of 1887 having been expressly made subject to the laws of the State by Congress, the Act of January 30, 1897, being a police regulation,

could not apply to them. This Court, however, entirely disregarded the express power of Congress under the Constitution to regulate commerce with the Indian tribes, *although the indictment alleged that the Indian, to whom the sale was made, was a member of the Kickapoo tribe of Indians, and also in charge of an Indian superintendent.*

In *McKay* v. *Kalyton* (1907), 204 U. S. 458, 467, this Court referred to the *Heff case* as "dealing with the subjection of allottee Indians in their personal conduct to the police regulations of the States of which they had become citizens." This Court apparently failed to discriminate between subjection of the Indian to State laws of a purely police nature and subjection to State laws which were in the nature of a regulation of commerce with the Indian tribes. Legislation of the latter kind is exclusively within the domain of Congress; and laws regulating and punishing sale of liquor to Indians, whether allottees or otherwise, so long as those Indians were members of an Indian tribe, could not be enacted by the States.

In holding that the Act of January 30, 1897, was a mere police regulation, this Court apparently overlooked the case of *United States* v. *Holliday*, 3 Wall. 407, not even citing or discussing it. Clearly, however, the *Holliday case* was not overruled by the *Heff case*, for not only was the *Holliday case* decided by a unanimous Court (while in the *Heff case* Mr. Justice Harlan dissented), but it has been repeatedly cited

as law by this Court,[1] while the *Heff case* has been very carefully distinguished in all subsequent cases where it has been urged upon the Court as a precedent;[2] and the *Heff case* has never been cited by this Court since the decision of the *Pelican case*. See especially *United States* v. *Mayrand* (1867), 154 U. S. 552, decided on the sole authority of *United States* v. *Holliday*.

Under these circumstances the Government is clearly justified in regarding *United States* v. *Holliday* as law and in asking this Court to overrule the *Heff case*, since it is obvious that the underlying theories of the two cases are utterly inconsistent.

5. *The tribal relations of the Sioux Indians, in fact, still continue. It has also been shown that the Indian in the case at bar is a member of the Sioux Tribe and in fact under the care of an Indian agent.*

This is set forth at length, supra, pages 14–20 of this brief.

6. *It is for Congress and not for this Court to say when the tribal existence shall be deemed to have terminated.*

As was stated in *United States* v. *Forty-three Gallons of Whiskey* (1883), 108 U. S. 491, 496:

> It would require very clear expressions in any general legislation to authorize the infer-

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[1] It was last cited in *Joplin Mercantile Co.* v. *United States* (1915), 236 U. S. 531, 545. It had been previously cited as authority in *Henderson* v. *City of New York* (1875), 92 U. S. 259, 270; *United States* v. *43 Gallons of Whisky* (1876), 93 U. S. 194; *Elk* v. *Wilkins* (1884), 112 U. S. 94, 100; *U. S.* v. *Mayrand* (1867), 154 U. S. 552; *Dick* v. *U. S.* (1908), 208 U. S. 340, 357; *Ex parte Webb* (1912), 225 U. S. 683; *U. S.* v. *Sandoval* (1913), 231 U. S. 28, 46, 47, 49; *Perrin* v. *U. S.* (1914), 232 U. S. 478, 482, 483.

[2] *Tiger* v. *Western Investment Co.* (1911), 221 U. S. 286, 314; *U. S.* v. *Celestine* (1909), 215 U. S. 278; *McKay* v. *Kalyton* (1907), 204 U. S. 458, 467; *Hallowell* v. *U. S.* (1911), 221 U. S. 317, 323; *U. S.* v. *Pelican* (1914), 232 U. S. 442, 450.

> ence that Congress purposed to depart from its long-established policy in regard to a matter of so vital importance to the peace and to the material and moral well-being of these wards of the nation.

And as said in *United States* v. *Sandoval* (1913), 231 U. S. 28, 46:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the question whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

See also to the same effect:

United States v. *43 Gallons of Whisky* (1876), 93 U. S. 188, 195.

Perrin v. *United States* (1914), 232 U. S. 478, 482, 486.

Lone Wolf v. *Hitchcock* (1903), 187 U. S. 553, 565.

United States v. *Rickert* (1903), 188 U. S. 432, 443, 445.

Rainbow v. *Young* (1908), 161 Fed. 835, per Van Devanter, J., cited with approval in *Tiger* v. *Western Investment Co.*, *infra*, and in *United States* v. *Sutton* (1909), 215 U. S. 291, 296.

Tiger v. *Western Investment Co.* (1911), 221 U. S. 286, 315, 316:

(p. 315) Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

The privileges and immunities of Federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. *Incompetent persons, though citizens, may not have the full right to control their persons* and property.

7. *Congress, when it terminates tribal status, does so in express terms.*

See Act of July 1, 1902, c. 1375, sec. 63 (31 Stat. 716), providing that "the tribal government of the Cherokee Nation shall not continue longer than March 21, 1906."

Act of March 1, 1901, c. 676 (31 Stat. 861), providing that "the tribal government of the Creek Nation shall not continue longer than March 4, 1906, subject to such further legislation as Congress may deem proper."

See also Act of June 16, 1906, c. 3335, sec. 25 (34 Stat. 280), in which mention is made of "any Indian who has severed his tribal relations, etc."

8. *The grant of citizenship does not ipso facto terminate tribal status.*

Thus, while by the Act of March 3, 1901, c. 868 (31 Stat. 1447), every Indian in Indian Territory was declared to be a citizen of the United States, Congress did not terminate the tribal government, and hence tribal status of the Cherokees and Creeks, until March 4, 1906 (see Act of July 1, 1902, and Act of Mar. 1, 1901, *supra*). On the other hand, with reference to the Choctaws and Chickasaws, Congress by the Act of June 28, 1898, c. 817, section 29 (30 Stat. 495), enacted that citizenship should not accrue until "their tribal government shall cease."

The Allotment Act of 1887, on the other hand, provided that citizenship accrued upon allotment of land to the Indians coming within the provisions of that act.

It will thus be seen that citizenship and tribal status are entirely distinct subjects, and not necessarily mutually exclusive. Both may coexist.

The question whether Indians have become fully emancipated and merged into the uncontrolled citizenry of the country depends not on any grant of citizenship by Congress or on their status as recipients of allotments or of fee simple patents, but necessarily depends upon the question whether they are still recognized as a dependent people with continued tribal relations by the executive or legislative branches of the Government (*United States* v. *Sandoval, supra*). Nothing in *Johnson* v. *Gearlds* (1914), 234 U. S. 422, p. 443, can be deemed to hold

that allottee Indians have so lost their tribal relations as to render Congress incapable of dealing with them under the Commerce Clause as members of an Indian tribe.

When Congress conferred upon allottees by the Act of 1887 United States citizenship, and hence State citizenship, such citizenship was consistent with and was intended by Congress to exist coincident with a continued tribal existence and Indian character for the purposes of regulation of commerce.

9. *An Indian allottee, even though a citizen, is still an Indian, and an Indian ward as well.*

United States v. *Celestine* (1909), 215 U. S. 278, 290.

United States v. *Pelican* (1914), 232 U. S. 442, 451.

United States v. *Sandoval* (1913), 231 U. S. 28, 47, 48.

10. *The general Allotment Act of 1887, conferring citizenship on allotted Indians and subjecting to State laws those allotted thereunder, did not abolish tribes nor deprive Congress of its power to regulate commerce with tribal allottees.*

Section 5 of the Act of 1887 clearly contemplates the continued status of these allottee Indians as members of Indian tribes.

Section 6 of the Act of 1887 did not in terms, or even impliedly, remove Indian allottees as a class from their status, as members of Indian tribes.

11. *The Act of 1887 did not repeal in express terms Revised Statutes, section 2139, by which statute Con-*

gress was exercising its constitutional power to regulate commerce with the Indians; and even if it did so repeal, it could not debar Congress from enacting in the future similar legislation as to Indian tribes and their members.

12. *Congress has no authority to delegate a power vested by the Constitution in it exclusively.*

When Congress by the Allotment Act of 1887 conferred citizenship upon Indian allottees, and subjected them to the civil and criminal laws of the State of their residence, it subjected them only to such State laws as were or might be within the constitutional sphere of State legislation.

The States have no more power to regulate commerce with Indian tribes (which includes commerce with tribal Indians) than they have to regulate commerce with foreign nations. Hence, existing or future State laws could not constitutionally regulate the liquor traffic with tribal Indians, so long as Congress still recognized these allotted Indians as tribal Indians.

To remove the bar or impediment of exclusive Federal power over commerce with Indian tribes which shuts the State out of the Federal domain, and thereby to allow the State to enter that domain, is to permit or sanction a State law in violation of the Constitution and, in effect, to delegate a Federal function to the State.

Such delegation of an exclusive Federal power can not be made. *Stoutenburgh* v. *Hennick* (1889), 129 U. S. 141, 149; *In re Rahrer* (1891), 140 U. S. 545,

560; *Cooley* v. *Board of Wardens* (1851), 12 How. 299, 317.

Even if it could so delegate, Congress must act expressly and not by implication, for the presumption is strongly against the surrender of Federal power by implication. *Rhodes* v. *Iowa* (1898), 170 U. S. 412, 424, per Mr. Justice White:

> The purpose of Congress to submit the incidental power to sell to the dominion of State authority should not, without the clearest implication, be held to imply the purpose of subjecting to State laws a contract which in its very object and nature was not susceptible of such regulation, even if the constitutional right to do so existed, as to which no opinion is expressed.

The conclusion that the provisions of Revised Statutes, section 2139, so far as they applied to tribal Indians, allotted or unallotted, remained in full force, even after the passage of the Act of 1887, seems irresistible. And if the *Heff case* decided that Congress had, by subjection of the allottee Indians to State laws, surrendered to the States its power to regulate commerce with the Indian tribes, the *Heff case* must be overruled.

13. *Even if Congress, by the Act of 1887, intended to adopt existing State laws upon the subject of the liquor traffic, and thus by implication to abandon its own regulation (a seemingly untenable implication), nevertheless it retained the power to reexercise control over regulation of commerce with the Indian tribes; and this power*

it exercised by passing the Liquor Traffic Acts of 1892 and 1897.

Assuming that Congress might legislate for the Indians by reference, by adopting existing State laws, it is nevertheless congressional, not State, legislation. The power to adopt or apply State laws to commerce with the Indians implies an equal power to Congress to reject those State laws, if later it shall decide its own Federal laws better suited. Hence the Act of 1887 viewed as a statute adopting State laws regulating commerce with Indian tribes and their members, was, of course, subject to repeal or amendment by Congress. And if State laws on this subject were to any extent made applicable by the Act of 1887, they were superseded by the Acts of 1892 and 1897, amending Revised Statutes, section 2139.

The *Heff case*, in holding that the subjection to State laws was irrevocable, was therefore clearly wrong. The Court's decision on this point was sustainable only if referring to an Indian who was emancipated, not merely in part by becoming a citizen, but wholly and completely by losing his tribal status, which was not true with respect to the allottee Indian therein (or in the case at bar) involved.

SUMMARY.

14. *Congress, by the Act of 1887, clearly did not terminate the tribal relationship or status of the allotee Indians. Hence it had no power irrevocably to commit the regulation of commerce with the Indian tribes into the hands of the States. And when by the Act of 1897 it exercised power to regulate, it had the right to do so.*

The wise words of Judge Sanborn in *Farrell* v. *United States* (C. C. A., 8th Cir., 1901), 110 Fed. 942, should control the decision of this case:

Page 948:

> *May not the Government confer all the privileges and immunities of citizenship upon its wards, and yet retain its power to regulate commerce with them; to protect them against their appetites, passions, and incapacity?* And, if it may lawfully do so, has it not done so in the case of the Indians of the Sisseton and Wahpeton bands? The true answer to these questions is not to be found in isolated statutes and constitutional provisions, but in a general view of the treaties, legislation, policy, and purpose of the Nation in its dealings with the members of Indian tribes.

Page 950:

> The review of the provisions of the acts of Congress and of the treaties which are relevant to the question at issue in this case is now completed, and it leads us to seriously question the main premise of the argument for the plaintiff in error, viz., that Congress has no power to regulate commerce with any citizen of the Nation. These Indians are citizens, but they were originally wards. The Nation had the right to prohibit the sale of liquor to them and to control and superintend their acts and proceedings. They were reasonable, friendly, peaceable, when sober; wild, passionate, and dangerous, when drunk. It adopted the settled policy of prohibiting the sale of

intoxicating liquors to them to protect Indians and white men alike. *Had it not the right to grant them all the privileges and immunities of citizens, and still to retain its power to protect them and their neighbors from the baleful effects of intoxication?* The question is susceptible of but one true answer. It had the same right and authority to retain this power of control over the commerce with these Indians that it had to retain the title to their lands in trust for them for 25 years or longer. It is contended that the retention of this control is inconsistent with the grant to them in the act of 1887 of all the rights, privileges, and immunities of citizenship. *But the privilege of buying whisky at all times and in all places is not one of the rights, privileges, or immunities of citizenship, within the meaning of the Constitution of the United States.*

Pages 950–951:

The Government then had the power to retain its control over this baneful traffic with these Indians, and its retention was not inconsistent with its grant to them of the rights, privileges, and immunities of citizenship. Did it exercise its right and retain its power? *It had this authority prior to the allotments under the act of 1887, and the burden is on him who assails it to show that it has been released or renounced.* It had been the unvarying policy of the Nation to retain and exercise this power for more than half a century. The wards of the Government needed protection from this pernicious traffic as much after their allotments

had been made and their patents had been issued as they did before. The issue of patents to them did not change the appetites, passions, character, habits, disposition, or capacity of these Indians. It did not radically change the title to the lands reserved for them, or their need of care and education. The Government held the title to their reservation in trust for them collectively before, it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why Congress should retain and exercise its power to superintend the trade with them, and none to induce it to renounce it.

Page 951:

> Neither the act of 1887 nor any other act of Congress or treaty with these Indians required those who selected allotments and received patents and the privileges and immunities of citizenship to sever their tribal relation, or to surrender any of their rights as members of their tribes, as a condition of the grant, *so that after their allotments, as before, their tribal relation continued.*

CONCLUSION.

The demurrer to the indictment should have been overruled by the District Court, and the judgment of that court sustaining such demurrer and dismissing the indictment should be reversed.

CHARLES WARREN,
Assistant Attorney General.

FEBRUARY, 1916.

APPENDIX A.

Immediately following the decision in the *Heff case* there was a great increase in drunkenness among the Indians, as shown by the following statements from the superintendents of many reservations contained in the Report of the Commissioner of Indian Affairs in 1905.

The report of the superintendent in charge of the Kickapoo, Sauk and Fox, and Iowa, August 23, 1905 (p. 224):

> Drunkenness has been greatly diminished and would have been practically eliminated but for the decision in the Heff case, which was fought very stubbornly to a decision adverse to our interest. There was great rejoicing among the licentious classes when this decision was published. Albert Heff, the defendant, although successful in winning a decision, was put to so much expense as to put him out of business.

The agent for Leech Lake Agency, in his report of August 29, 1905 (p. 230), says:

> *Intemperance.*—The consumption of alcoholic liquors by the Indians is increasing rapidly. The recent decision of the Supreme Court declaring an allotted Indian a citizen and no longer subject to the prohibitory laws forbidding the sale of alcoholic liquors to Indians is doing incalculable harm to the Chippewas. Liquor is now sold over the bar to Indians and white folks alike in all or nearly

all licensed saloons. This evil, extending as it does to the women and children, will in a few years destroy the race. I know of no remedy, except new laws are enacted by Congress forbidding this traffic and stringent measures adopted enforcing them. The love of liquor seems to be a ruling passion with all Indians, and moral suasion is of no avail. Drunkenness can only be controlled by rendering it difficult or impossible for Indians to obtain liquor.

The superintendent in charge of the Omaha Agency, in his report of August 24, 1905 (p. 249), states:

> The difficulties of protecting the Indians from the harpies who ply this nefarious trade among them have been greatly increased as a result of the recent decision of the United States Supreme Court in the case of Albert Heff. To the credit of the towns bordering the reservation it may be said that many of them have made commendable efforts to offset this unfortunate decision by, in some cases, refusing to license saloons within their limits, and in others to grant licenses only on condition that no liquor be sold to Indians. But notwithstanding, more drunkenness than ever now prevails among the Indians, chiefly due to the fact that bootleggers have encamped on the bank of the Missouri River in Iowa, and the Indians cross in boats to purchase liquor from them. As these parties have complied with all the requirements of law in respect to revenue and local licenses, there is no legal recourse against them.

The superintendent of the Cheyenne River School, in his report of August 17, 1905 (p. 332), says:

> It was gratifying to me to state last year in my report that there had not been a single case of intoxication on the Crow Creek Reservation during the entire year. It is not so this year. Since the decision of the United States Supreme Court giving allotted Indians a lawful right to purchase intoxicating liquor, I have had quite a number of cases of drunkenness. I regret very much that such a decision was rendered, even though it is the law.

The agent for the Lower Brulé Agency states in his report of August 28, 1905, that (p. 337):

> These Indians morally are above the average, although I find that the Heff decision of the United States court has made some difference in the way of drunkenness.

The agent for the Rosebud Agency, in South Dakota, in his report of August 25, 1905, states (p. 344):

> There can be no doubt that drunkenness and immorality have increased on this reserve since the recent decision of the United States Supreme Court that it is no crime to sell liquor to an Indian who has taken his allotment of land, and on a reserve as large as this one it is very difficult to prevent the introduction of liquor.

The report of the agent for the Sisseton Agency, August 7, 1905, states (p. 347):

> The recent decision of the Supreme Court relative to the constitutional right of the Indian to purchase liquor is bound to work a detriment to many of the Indians morally, socially, and civilly, especially when they are flush with money, which is being demonstrated since the recent payment. I have heretofore taken the position that any considerable amount of money paid to a large number of Indians of the reservation at any one time would work a detriment to them instead of a benefit, and I have no reason to change my opinion, especially so since the said decision has become generally known.
>
> But little remains to be said under the head of the sale of liquor to Indians since they have become citizens, further than to say that open drunkenness is becoming more prevalent among the younger as well as among a certain class of older Indians; hence degeneration follows.

The agent for the Yankton Agency states in his report of August 29, 1905 (p. 348):

> At the beginning of the year we had great hopes of an increase of interest for their betterment by the Indians themselves, and in fact there was considerable up to about the 1st of June, when the knowledge of their freedom to buy whisky became general among them. Then apparently all work ceased. However, a few are again taking hold and putting up hay for their future wants.
>
> * * * * *

> The younger and more reckless element have made me considerable trouble since the late decision of the Supreme Court declared all allotted Indians citizens, and they seemed to get the idea that the proper way to show to the world their appreciation of citizenship was to go and get gloriously drunk and bring as much whisky home with them as they could get home with and have a general carouse as long as the liquor would last, and owing to this debauchery there have been two deaths from alcoholism. Vigorous effort has been made to suppress this class of crime among the Indians, with but little effect thus far.

The superintendent in charge of the Tulalip Agency, in his report of August 15, 1905, makes the following statement (p. 364):

> The Heff decision will doubtless undo much of the good work of years so far as the Indians of this agency are concerned. Indeed, it is already doing so. The prosecution of offenders hitherto has been reasonably vigorous. The traffic became thereby hazardous. It was difficult for an Indian to procure liquor, and we had a reasonably sober, decent Indian population. All of the old offenders in custody pending a hearing have been turned out of the jails and are at liberty again to assist others in selling liquor to the ever-eager Indian purchaser. The Heff decision has given the traffic an undreamed stimulus. The result so far has been more drunkenness in the l[illegible] three months among our Indians than occ[illegible]ed during many years prior thereto. Our older and better Indians are grieved and [illegible]ave ex-

pressed their sorrow over the recent Heff decision. They say, "Too much citizenship make our people all the same like the Puyallups." The Puyallup Indians have had citizenship for some time, and now have the reputation among our people here of being a worthless lot of drunken Indians, who have lost most of their property, self-respect, health, homes, and all that they possessed, except their citizenship, which they still retain intact, but disfigured and shopworn from too much contact with exhilarating spirits. Our better Indians predict that most of their people will soon be like their Puyallup neighbors, and from the start they have taken the prediction will be realized in a very short time.

It is quite true that the State has upon its statute books laws which prohibit the sale of liquor to Indians. So, too, the municipalities have similar ordinances. In 11 years of residence among these people and in this vicinity I have yet to hear of a single case in which the State law or the municipal ordinance was ever enforced. In four very vigorous years of prosecution I have secured remarkably few convictions, and these only upon pleas of guilty—in all of which the minimum penalty was given.

The superintendent in charge of Winnebago, in his report of October 23, 1905, states (p. 380):

Drinking consumes most of their money. Since the decision of the Supreme Court has given them the right to buy liquor when and where they please, drunkenness is unrestrained among them.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 681.

THE UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,

vs.

FRED NICE.

BRIEF FOR DEFENDANT IN ERROR.

O. D. OLMSTEAD,
W. B. BACKUS,
W. J. HOOPER,
Attorneys for Defendant in Error.

(24,964)

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,

vs.

FRED NICE, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

This proceeding is brought to this court by writ of error to the United States District Court for the District of South Dakota to review the order of the said court sustaining a demurrer to an indictment.

The indictment was brought under section 2139, of the General Statutes, as amended by the act of Congress of January 30, 1907, chap. 109; 29 Stat. L., 506, and in effect charges that the defendant did, on the 9th day of August, 1914, at the town of Carter, in the county of Tripp, in the State of South Dakota and District aforesaid, sell, give away, dispose of, exchange and barter certain intoxicating liquors, to one George Cortier, an Indian of the Sioux Tribe of Indians, which said Indian was then and there under the charge of Charles L. Davis, a duly appointed Indian Agent

of the United States, and an Indian of the Sioux Tribe of Indians of which said Indian the Government of the United States then and there, through its departments, exercised guardianship, and an Indian to whom, on the 29th day of April, 1902, an allotment was made by the United States and the title to which land the Government of the United States then and there held in trust for said Indian, contrary to the form, force and effect of the Statute of the United States in such case made and provided.

To this indictment the defendant demurred on the grounds that the same did not state facts sufficient to constitute a public offense against the laws of the United States.

The demurrer coming on to be heard, the District Court, by its order, sustained the same by a written opinion dated the 8th day of September, 1915, and which is attached to and made a part of the return to writ of error.

ARGUMENT.

The decision of the District Court was based on the construction given to the statute under which the indictment was drawn *In Re* Heff, 197 U. S., page 48. The defendant in error stands on the decision in that case, and respectfully contends that this decision correctly construes the statute, and that, thereunder, he is not guilty of an offense.

We respectfully submit that the order of the United States District Court for the District of South Dakota was correct, and the order should be affirmed.

O. D. OLMSTEAD,
W. B. BACKUS, AND
W. J. HOOPER,
Attorneys for Defendant in Error.